In the Supreme Court of the United States

October Term, 1957

No. 618

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

BRESWICK & CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY OF THE INTERSTATE COMMERCE COMMISSION TO APPELLEES' MOTION TO AFFIRM

The appellees' motion to affirm the judgment below illustrates dramatically our contention that the District Court's decision was based upon an issue foreclosed by the earlier decision of this Court, and that appellees' motion to affirm is based largely upon matters which the appellees had no standing to raise and which, therefore, that court had no power to consider.[1]

[1] We will not repeat here the contention in our Jurisdictional Statement that the decision below violates the mandate of this Court in *Alleghany Corporation* v. *Breswick & Co.*, 353 U. S. 151, or the reasons stated in our brief before this Court, for our view that the court below erred in again holding that Alleghany's control of New York Central System requires the Commission's approval under Section 5 of the Interstate Com-

1. The appellees' contention that the Commission's order violated Section 20a of the Interstate Commerce Act, in that it authorized Alleghany Corporation to capitalize its allegedly illegally acquired investment in New York Central common stock, is completely without substance. It is true that in cases cited by appellees (Motion, pp. 16–18), the Commission has refused to authorize, under Section 20a, carriers to issue *additional* securities on the basis of carrier properties or securities acquired without the Commission's approval under Section 5. It is obvious that the principle of those cases has no application in this case where the securities authorized by the Commission are not related to the capitalization of any particular assets or acquisition of assets by Alleghany, but were issued solely in exchange for outstanding preferred stock plus accumulated dividends. No case cited by the appellees (or by the court below) is to the contrary. Moreover, no such issue was presented to the Commission, and the appellees as common stockholders of Alleghany do not show that they have standing to raise it.

2. The appellees also contend that the Commission's order is invalid on the ground that on the date of the order the market value of Alleghany's investments was less than the aggregate market value of Alleghany's outstanding securities (Motion, pp. 29–35). Specifically, they assert that "it is plainly con-

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merce Act. Also, we need not comment upon the appellees' statement of the question as [redacted] whether the court below correctly "affirmed" the decision of Division 4 of the Interstate Commerce Commission.

trary to the public interest to facilitate the unloading upon the public markets of equity securities when there exists a shortage of assets to support the market prices at which the outstanding equity securities are selling" (Motion, p. 33).

The complete lack of merit in this argument is demonstrated by the fact that it is based upon three prior Commission cases involving *increases* in carriers' capital structures through the issuance of *new and additional* securities. Here, the Commission's order authorized Alleghany to issue convertible preferred stock in exchange for outstanding preferred stock and dividend arrearages. As a practical matter, appellees' argument reduces to the preposterous contention that Section 20a permits or prohibits Alleghany from issuing stock in exchange for its preferred stock and accumulated dividends, depending upon the fluctuating market prices for Alleghany's stocks and for its investments.

3. Before the Commission and up to this point in this litigation, the appellees attacked the Commission's stock order as being unduly favorable to the holders of Alleghany's outstanding 5½% preferred stock. This attack was based upon various speculative calculations of benefit which were in turn based upon stock market quotations in 1955. Indeed, this Court held that appellees' only standing in the case derived from the alleged dilution of the common stock equity. With fluctuating market conditions, the appellees' attack upon the order has shifted to alleged concern for the welfare of Alleghany's preferred stockholders—to the adequacy of the asset

coverage of the new convertible preferred shares. Appellees, as holders of 700 shares of Alleghany common, clearly lack standing to represent the interests of the preferred stockholders. Indeed, such opportunistic changes of position with the stock market suggest that they have no genuine interest at all.

4. The whole thrust of the appellees' position, both in the District Court and this Court, has been to misrepresent the purpose and rationale of the Commission's order. Briefly, that rationale is this: since 1946, Alleghany has engaged in a series of stock purchase and exchange programs with the objective of eliminating huge preferred stock dividend arrearages which had accumulated since 1931; the Commission's instant order authorized Alleghany to largely complete this program, thereby finally placing its capital structure upon a current basis, by offering new 6% convertible preferred shares in exchange for outstanding 5½% convertible preferred shares plus more than $17,000,000 in dividend arrearages. The primary issue was the general fairness of the plan for the elimination of the dividend arrearages on the old preferred stock—a common problem in voluntary recapitalizations since the great depression. See II Deming, *Financial Policy of Corporations,* (1953) pp. 1194–1209. The Commission could not undertake to predict what the effect of each conversion as it takes place over the life of the new preferred stock would be under changing market conditions. It could only determine the general fairness of the plan,

and that its result would be consistent with the standards of Section 20a. It bears emphasis that preferred stockholders without dividends for 24 years, and common stockholders whose prospects are buried under such dividend arrearages, cannot find in any exchange offer the security of government bonds.

The appellees have insisted variously that the fairness of the exchange offer must be determined as of June 23, 1955, when they alleged it was unfair to the common stockholders, or as of today, when they insist it is unfair to the preferred stockholders. It is settled that the Commission need not give controlling weight to temporary market quotations. Rather, as this Court held under the Public Utility Holding Company Act, "the informed judgment of the Commission rather than that of the market, has been designated by the Act as the appropriate guide." *Niagara Hudson Corp.* v. *Leventritt,* 340 U. S. 336, 346–347.

The other prong of their attack has been, as we have pointed out, irrelevant insistence that the Commission should have applied standards of asset coverage and capitalization which, on their face, have no application to an exchange of securities which results in no increase in capital structure.

The crucial fact remains that, leaving aside issues which were not properly before the court below, that court has sustained the Commission's order as satisfying every pertinent standard and requirement of the Interstate Commerce Act.

CONCLUSION

We contend, for the reasons set forth in our Jurisdictional Statement, that the judgment of the District Court is based solely upon issues barred to that court by the prior decision of this Court in *Alleghany Corporation* v. *Breswick & Co.*, 353 U. S. 151. The appellees' motion to affirm demonstrates that the judgment can be sustained only upon grounds which are legally and factually irrelevant to the present case, even if the appellees had standing to raise them and had done so before the Commission. Accordingly, we submit that the motion to affirm should be denied, and the appellant's prayer for summary reversal of the decision below should be granted.

Respectfully submitted,

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DECEMBER 1957.

U. S. GOVERNMENT PRINTING OFFICE 1957